No. 16058

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

vs.

C. C. HARTMAN, Rear Admiral, USN, Commandant, Eleventh Naval District,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

RULES

STATUTES

PAGE

TABLE OF AUTHORITIES CITED IN APPENDIX

REGULATIONS PAGE

STATUTES

TEXTBOOKS

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Statement of Jurisdiction.

In the Court below, jurisdiction was claimed to exist by the plaintiff under 28 U. S. C. 1651(a) as to the First Cause of Action of the Amended Complaint and under 28 U. S. C. 1331, 1355, 2201, 2202, 2282 and 2284 as to the Second Cause of Action of the Amended Complaint [R. 7, 11, 18]. Plaintiff expressly disclaimed assertion of habeas corpus jurisdiction [R. 5]. The Court below sustained its jurisdiction as to the Second Cause of Action under 28 U. S. C. 1331.

This Court has appellate jurisdiction under 28 U. S. C. 1291.

Statement of Case.

Appellant in July, 1923, entered the United States Naval Academy, Annapolis, Maryland, as a midshipman. He graduated therefrom and was commissioned an Ensign, United States Navy, on June 2, 1927, in the regular component of the United States Navy [R. 43]. He

thereafter served as a commissioned officer of the regular component of the United States Navy, in active naval service on various ships and stations and was promoted from time to time until December 1, 1948 [R. 43, 44].

On July 12, 1948, he applied to the Secretary of the Navy, requesting voluntary retirement and transfer to the Retired List, thereby to be voluntarily retired, effective December 1, 1948. His request was granted by the Secretary and he was transferred to the Retired List of Officers of the Navy effective December 1, 1948, being given the rank of Rear Admiral and thereafter receiving the retired pay of the naval rank of Captain [R. 40, 41, 42]. Nothing in the record indicates that he has ever since December 1, 1948, ceased to be a Retired Officer entitled to receive and receiving pay.

Rear Admiral C. C. Hartman is Commandant of the Eleventh Naval District which has its headquarters at San Diego, California [R. 27, 28]. The Eleventh Naval District consists of the State of Arizona, Clark County of Nevada, and that portion of California which includes San Bernardino, Santa Barbara and Kern Counties and the counties to the south thereof.[1] On April 15, 1957, there were received at Headquarters, Eleventh Naval District, sworn charges under the Uniform Code of Military Justice [R. 27, 28]. These charges alleged that appellant did, on certain dates, which dates were after December 1, 1948, commit certain offenses in violation of that Code [R. 19-23].

The charges were investigated and other preliminary steps were taken [R. 28] and a General Court-Martial

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[1]We ask the court to take judical notice of the boundaries of the Eleventh Naval District. See: Federal Register Division, United States Government Organization Manual, 1957-1958, page 177.

was appointed by appellee, Admiral Hartman, for trial of the charges [R. 30, 31].

On May 2, 1957, appellant filed a document in the Court below entitled "In the Matter of the Petition for Writ of Prohibition by Selden G. Hooper." On May 3, 1957, the Court below on its own motion dismissed that Petition with leave to file an Amended Petition [R. 3]. No appeal was ever taken from the dismissal of that original Petition, or the denial of any immediate interlocutory relief it may have demanded.

On May 6 and 7, 1957, appellant was tried before the General Court-Martial, was found guilty of several offenses and was sentenced to be dismissed from the service and to forfeit all pay and allowances [R. 32-34].

On May 15, 1957, appellant filed his Amended Complaint [R. 19].

On May 27, 1957, appellee completed his action as convening authority with respect to the court-martial case and forwarded the record of the proceedings to the Navy Board of Review in the Office of the Judge Advocate General of the Navy [R. 29, 30, 34, 35].

The Board of Review announced its decision on September 10, 1957, and the case was thereafter transmitted to the United States Court of Military Appeals, being docketed therein as No. 11113 [R. 52, 53]. The Court below enter Judgment on May 13, 1958[2] [R. 59-70]. The Court of Military Appeals announced its opinion and decision on September 26, 1958.[3]

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[2]The Findings of Fact and Conclusions of Law are published at 163 Fed. Supp. 437.

[3]We ask this Court to take judicial notice of the opinion which is reported at 9 U. S. C. M. A. 637, 26 C. M. R. 417, and which is printed, for the convenience of the Court, as an appendix to this brief.

Summary of Argument.

1.

THE ENTIRE SUIT SHOULD HAVE BEEN DISMISSED BY THE DISTRICT COURT FOR LACK OF AN INDISPENSABLE PARTY, AND ON JURISDICTIONAL GROUNDS.

A. THIS POINT MAY BE RAISED NOTWITHSTANDING THAT THERE HAS BEEN NO CROSS-APPEAL.

B. THE SECRETARY OF THE NAVY, WAS AN INDISPENSABLE PARTY, LACKING WHOM, THE ENTIRE SUIT SHOULD ALSO HAVE BEEN DISMISSED ON THAT GROUND.

C. THIS SUIT COULD NOT PROPERLY BE BROUGHT OUTSIDE OF THE DISTRICT OF COLUMBIA.

D. THERE WAS NO JURISDICTION UNDER THE CIRCUMSTANCES TO TREAT THE SUIT AS A PETITION FOR A WRIT OF HABEAS CORPUS.

2.

UNDER THE CIRCUMSTANCES OF THE CASE, IT WAS PROPERLY DETERMINED AS A MATTER OF LAW THAT APPELLANT SHOULD HAVE NO RELIEF IN THE COURT BELOW BECAUSE OF HIS FAILURE TO EXHAUST THE MILITARY APPELLATE REMEDIES AVAILABLE TO HIM.

3.

THE TRIAL AND SENTENCE OF APPELLANT BY GENERAL COURT-MARTIAL WAS NOT IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

A. RETIRED OFFICERS OF A REGULAR COMPONENT OF THE ARMED FORCES ENTITLED TO RECEIVE PAY ARE MEMBERS AND OFFICERS OF THE ARMED FORCE CONCERNED AND ARE MILITARY OFFICERS OF THE UNITED STATES, THE SAME AS THOSE ON ACTIVE DUTY.

B. THE PRESIDENT OF THE UNITED STATES HAS THE CONSTITUTIONAL POWER TO TERMINATE THE HOLDING OF MILITARY OFFICE UNDER THE EXECUTIVE BRANCH.

C. RETIRED PERSONS OF REGULAR COMPONENTS OF THE ARMED FORCES OF THE UNITED STATES ENTITLED TO RECEIVE PAY ARE CONSTITUTIONALLY SUBJECTED TO TRIAL BY COURT-MARTIAL FOR OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

ARGUMENT.

1.

The Entire Suit Should Have Been Dismissed by the District Court for Lack of an Indispensable Party, and on Jurisdictional Grounds.

A. This Point May Be Raised Notwithstanding That There Has Been No Cross-Appeal.

At the outset in this case, we are compelled to raise the point regarding the jurisdiction of the Court below and the sufficiency of the parties, which was decided against appellee notwithstanding the fact that appellee prevailed on other grounds.

The Court below concluded that the Secretary of the Navy, who was not served or joined and whose office is located in Washington, D. C., was an indispensable party to any relief under the First Cause of Action and a portion of the Second Cause of Action pleaded. However, the Court also determined that "the Secretary of the Navy was not an indispensable party defendant and defendant C. C. Hartman is a sufficient party defendant" to the extent of entertaining the prayer for declaratory judgment [Conclusion of Law No. 8, R. 66].

It is our position that this last determination of the Court below was erroneous. It is proper at this stage for appellee to assert such error notwithstanding the fact that no cross-appeal has been filed. An almost identical situation recently occurred in *Stroud v. Benson,* 254 F. 2d 448, in which the Secretary of Agriculture and others were sued in the Eastern District of North Carolina. The District Court decided the case in favor of the Secretary on the merits after assuming he was not indispensable, and that its jurisdiction was therefore suf-

ficient. The plaintiffs appealed, and on appeal, the Court of Appeals stated at page 451:

> "The jurisdictional question however claims our attention and we are bound to deal with it despite the failure of the Secretary to cross-appeal. *United States v. American Railway Express Company* (1924), 265 U. S. 425, 44 S. Ct. 560, 68 L. Ed. 1087; *Langnes v. Green* (1931), 282 U. S. 531, 535, 51 S. Ct. 243, 75 L. Ed. 520; *Jaffke v. Dunham* (1957), 352 U. S. 280, 77 S. Ct. 307, 1 L. Ed. 2d 314."

B. The Secretary of the Navy Was an Indispensable Party, Lacking Whom, the Entire Suit Should Have Been Dismissed on That Ground.

The Amended Complaint originally prayed for a variety of relief including injunction, Writ of Prohibition, etc., but we assume Appellant is satisfied with a Declaratory Judgment alone, inasmuch as the jurisdictional matters are not mentioned in his specification of errors or in his brief.

In addition to grounding jurisdiction upon 28 U. S. C., Section 1331, the Amended Complaint also mentioned at various places Sections 1651, 2201, 2202, 2282 and 2284 of that Title. It is clear beyond argument that none of these provisions are sources of jurisdiction, but they are all procedural statutes which provide additional or ancillary remedies, or certain limiting requirements in cases where there is jurisdiction in the court under some other provision of law. It is so held as to the Declaratory Judgment Act (Secs. 2201, 2202), the Three Judge Court statute (Secs. 2282, 2284), *Van Buskirk v. Wilk-*

inson (C. A. 9), 216 F. 2d 735, and as to the All Writs Act (Sec. 1651(a)).

Petrowski v. Nutt (C. A. 9), 161 F. 2d 938;

Marshall v. Crotty (C. A. 1), 185 F. 2d 622, 626;

In re Commonwealth of Massachusetts, 197 U. S. 482.

Viewed as an application for relief in the form of an extraordinary Writ of Prohibition or Mandamus, the jurisdictional statute, 28 U. S. C. 1331 provides no basis for the suit because it has long been held that such extraordinary proceedings are not "civil actions" within the meaning of the section, and there is no residual common law basis for power to issue such writs in the Federal Courts (outside of the District of Columbia, at least).

Marshall v. Crotty, supra;

McIntire v. Wood, 7 Cranch. 504;

In re Binninger, 3 Fed. Cas. No. 1417;

Cf., Smith v. Whitney, 116 U. S. 167, 175.

Rule 81(b), F. R. C. P., did not change the situation, even though it abolished the Writ of Mandamus, substituting therefor a "civil action" for equivalent relief, because it expressly incorporates only "relief heretofore available by mandamus."

Can a "civil action" be maintained in the present situation? Admittedly, as the Court below found, there is a "Federal question" and a sufficient amount in controversy. As shown above, the Declaratory Judgment Act, the All Writs Act and the Three-Judge Court statute

add nothing, so it avails appellant nothing to limit himself to a demand for only one form of relief or procedure. There must be a basis for jurisdiction shown, and if there is jurisdiction for any of the relief, there would be jurisdiction for all of it. The same principles apply to the requirement of indispensable parties because from the nature of this suit the relief demanded is indivisible: if the superior officer, the Secretary of the Navy, is indispensable at all, he is indispensable altogether for the objects of the suit, and any decree, or procedures enforced against the present appellee would be a complete illusion and would effect nothing so far as protecting the rights of the appellant are concerned.

We do not have here a situation like that where a jurisdiction has been created expressly or by implication by Act of Congress for review in, or appeal to, the various District Courts and Courts of Appeal of the decisions or actions of Federal agencies.[4] On the contrary, the Administrative Procedure Act is expressly inapplicable to military matters, including courts-martial. 5 U. S. C. 1001(a)(2). Thus immigration cases which are allowed to be brought against inferior officers, where the Attorney General would otherwise be an indispensable party, are allowed on the grounds of an implied, but specific, grant of such review jurisdiction in the Administrative Procedure Act,

Shaughnessey v. Pedreiro, 349 U. S. 48, 53,

and those cases are thus inapplicable to the present situation.

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[4]Such as the provisions in, for example: The Social Security Act, 42 U. S. C. 405(g), the Longshoreman's and Harbor Worker's Compensation Act, 33 U. S. C. 921, the Administrative Procedure Act, 5 U. S. C. 1009, or other statutes such as 5 U. S. C. 1031, *et seq.*, granting jurisdiction for review of orders of certain agencies.

Absent such specific statutory provisions, this suit must be governed by general principles developed by a number of cases. In numerous cases where suits were brought against the local government officials of various government activities, the head of the Department concerned has been held indispensable. In others he has been held not to be so, the local officer being sufficient.[5] In *Colorado v. Toll,* 268 U. S. 228, the object of the suit was to restrain the superintendent of a National Park from enforcing certain regulations upon the conduct of persons in the park, the regulations being allegedly unauthorized. (Suit was in the District of Colorado.) It was held that the superior was not indispensable. In *Knorr v. Miles* (D. Mass.), 60 Fed. Supp. 962, the superior was not indispensable to restrain enforcement of a regulation which would have barred plaintiff's employment with a government contractor. A similar result was reached in *Parker v. Lester,* 112 Fed. Supp. 433, reversed in part by this Court, 227 F. 2d 708, where the Commandant of the Coast Guard was held not indispensable in restraining the enforcement of regulations which would have interfered with the rights of the plaintiffs to contract for employment at the port of San Francisco, within the District of the court. In *Hynes v. Grimes Packing Co.,* 337 U. S. 86, the Secretary of the Interior was held not indispensable, where the Regional Director of the Fish and Wildlife Service for Alaska was before the Court in a suit to restrain the enforcement of regulations which would have affected the fishing rights of private parties. Consistent with these is the famous old case of *United States v. Lee,* 106 U. S. 196, where the

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[5]The cases are collected in Moore's Federal Practice, Section 19.16.

indispensable superior officer problem was not discussed, the issues centering on whether the United States itself was indispensable. In that case a suit in ejectment was allowed in the Eastern District of Virginia whereby government employees were ejected from certain land and forbidden to re-enter it, at the suit of the owner, notwithstanding the claim of the employees that they were rightfully there under the authority of the government under a claim that the government had acquired the land. But the court carefully stated that it was not trying the title of the United States (see: *Land v. Dollar,* 330 U. S. 731, 741, Reed, J., concurring).

Very recently in *Murphy v. Benson,* 164 Fed. Supp. 120, the Secretary of Agriculture was held not to be indispensable in a suit brought in the Eastern District of New York to restrain an insecticide spraying program of land including that of the plaintiffs. In the leading Supreme Court case which briefly sets forth the rule to be followed, *Williams v. Fanning,* 332 U. S. 490, the Los Angeles Post Office was stopping mail received there from elsewhere in the country which was intended for a local addressee, and, among other things, returning it to the senders. It was held that the Los Angeles Postmaster was a sufficient party and that the Postmaster General was not indispensable.

On the other hand the superior officer, usually the Cabinet member heading the Department concerned, has been held indispensable in the following cases. In *Warner Valley Stock Co. v. Smith,* 165 U. S. 28, a suit brought in the District of Columbia to compel the issuance of land patents to the plaintiff, and to restrain certain other disposition of public lands, only a subordinate of the Secretary of the Interior was before the Court, the incumbent

Secretary not being a defendant. It was held that the Secretary was indispensable and that the suit could not be maintained against the subordinate. In *Webster v. Fall,* 266 U. S. 507, a suit was brought in Oklahoma to compel a disbursing agent to pay out money contrary to regulations of the Secretary of the Interior. Held: the Secretary was indispensable. Likewise in *Gnerich v. Rutter,* 265 U. S. 388 the Commissioner of Internal Revenue was held to be indispensable in a suit in California to compel issuance of a permit under the Prohibition law.

More recently, in *Carson v. Meador,* 120 Fed. Supp. 260 the Probation Officer of the Southern District of California was sued in an attempt to obtain better parole terms than were granted by the United States Parole Board under an admittedly valid sentence. It was held that the Parole Board in Washington, D. C. was indispensable.

In cases of discharge of government employees it is generally held that the superior is indispensable to a suit to compel reinstatement or to review the discharge.

Blackmar v. Guerre, 342 U. S. 512;

Marshall v. Crotty (C. A. 1), 185 F. 2d 622;

Daggs v. Klein (C. A. 9), 169 F. 2d 174.

In the most recent case, the plaintiffs sued with the object, in effect, of compelling an increase in the crop price supports put in effect by the Secretary of Agriculture. It was held that the Secretary was indispensable.

Stroud v. Benson (C. A. 4), 254 F. 2d 448.

What is the rule to be followed? *Williams v. Fanning, supra,* states it as follows, at page 493, where it is stated that the superior officer is indispensable where: "the decree granting the relief sought will require him to take action,

either by exercising directly a power lodged in him or by having a subordinate exercise it for him." Under all the cases the superior is not indispensable however if the relief sought is only prohibitory in nature and does not require an act on the part of either the subordinate before the court or the superior. Where the only means of acting is through a subordinate who must be within the jurisdiction of the court, in order to act, the order of the court against the subordinate effectively "binds" the superior as a practical matter,[6] even though the superior is not before the court to be *legally* bound[7] to the court's decision.

In order to determine if the superior officer, in this case the Secretary of the Navy, is indispensable, as stated in *Stroud v. Benson, supra*, p. 452:

> "One must look to the nature and effect of the proceeding and not merely to the names of the titular parties."

The general scheme of initiating and carrying out courts-martial proceedings is set forth in the Uniform Code of Military Justice, 10 United States Code, Sections 801-940, and the Presidential Regulations promulgated thereunder.[8]

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[6]This illustrates that the actual holding in *Williams v. Fanning* goes somewhat beyond the rule stated. Suppose, in that case, the Postmaster General decided to (1) abolish all mail service to Los Angeles? or (2) to identify the particular mail and stop it at the various places from which sent rather than when received at Los Angeles? The Supreme Court apparently recognized these as practical impossibilities.

[7]Unless, of course, there is some special statutory implication, as in *Shaughnessey v. Pedreiro.*

[8]Act of May 5, 1950, 64 Stat. 107, formerly 50 U. S. C. 551-736, reenacted in New Title 10, U. S. C., 70A Stat. 36; the Presidential Regulation is the Manual for Courts-Martial, United States, 1951, referred to as "MCM"; promulgated as Executive Order 10214, February 8, 1951, 3 CFR, 1951 Supplement.

It is clear that since May 27, 1957, the Court below lacked the necessary and indispensable parties without whom the suit could not be maintained. Even if we assume, for the moment, that prior to May 27, 1957, when the charges were preferred, investigated, brought to trial, and the record prepared and reviewed as required by military law, the Appellee bcause of his connection with the matter was a sufficient subordinate of the Secretary of the Navy with respect to it so that the decree of the Court could effectively "expend itself" and thus, in effect, bind his superior, nevertheless, since May 27, 1957, when appellee made his order of approval of the proceedings and forwarded the court-martial record to the Judge Advocate General of the Navy, he became and has remained an entire stranger to any further proceedings in the court-martial case, or any action to be taken if the sentence becomes final. There must be approval by the Board of Review, the Court of Military Appeals and the President before the findings and sentence are final, and the sentence ordered into execution. (10 U. S. C. 866(b), 867(b)(1), 871(a). See: *Runkle v. United States,* 122 U. S. 543.) The dismissal, if and when it is to be effected is by an order of execution published by the Secretary, or the Department of the Navy on his behalf. (See: MCM, pars. 90b(2) and 107.) The entry of it would be upon appellant's service records which are kept in the Bureau of Naval Personnel at the Department (see: 10 U. S. C. 5131, 5132), and any action to cause his pay to stop would be done at the same place, and probably be communicated to the Navy finance establishment at Cleveland, Ohio, from where appellant's pay is presently disbursed. Plainly appellee has nothing to do with these things. The sentence does not require appellee or anyone else to presume to interfere with any property right, or with the exercise of any

personal right of appellant, the locus of which could be said to be within the district of the Court below, or, under the command of appellee. On the contrary, appellant's right to continue receiving his pay, his right to remain a retired officer of the Navy, his right not to be separated therefrom with the dishonorable characterization of dismissal by general court-martial, are incidents of his relationship and status with the United States itself.

Since the situation must be considered as a final judgment, the relations of the parties from the inception of the charges up to May 27, 1957, do not make any difference. But it must be observed that, absent facts which would support habeas corpus jurisdiction, under the rules of the applicable cases, the Secretary of the Navy was an indispensable party even then. The reason for this lies in the fundamental character of the procedure in the military jurisdiction. As to a person on ordinary active duty status in an Armed Force, the exercise of court-martial jurisdiction is not limited by reference to the "State" or "District" where the crime was committed because the jurisdiction is based upon the *status* of the accused person, rather than the *place* where he is or where the offense occurred. Rather, the question of who, or which entity, is to exercise the jurisdiction and proceed with a case is referable to, and determined by, generally, the organization, Armed Force, or "chain-of-command" in which an accused has his status. Thus the trial and review of a court-martial case is within the Armed Force of which an accused is a member, as a general rule. (10 U. S. C. 817, see: MCM, pars. 4g(1) and 13.) Within the Armed Force concerned, charges against an active duty member are dealt with through the echelons of command of which the accused is a member. (MCM, pars. 31, 32f, 33i.) A retired officer such as appellant is how-

ever not a member of any "unit" or "organization," in the ordinary active duty sense, inferior to the Department concerned. This situation is provided for however. MCM, paragraph 31c reads:

> "In exceptional cases in which the accused is not, strictly speaking, under the command of any military authority inferior to a particular Department, the general principles of this paragraph (31) are applicable; but the charges may, according to the particular circumstances, be forwarded either to the appropriate Department or to the area command in which the accused may be . . ."[9]

In the appellant's court-martial case, the Secretary left the matter of initiating the proceedings in the hands of appellee, as commandant of the "area command" wherein appellant was located. But the Secretary was not legally obliged to do so; he could have retained the case and convened the court-martial himself if he chose. (10 U. S. C. 822(a)(2), 822(b).) Thus the case is different from *Williams v. Fanning,* because an injunction against appellee would not stop the Secretary of the Navy from convening a court-martial elsewhere, as a practical matter. Thus any decree or injunction entered against appellee would be illusory and would be actually nothing more than an advisory opinion between parties no longer in substantial controversy.

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[9]This is a paraphrase of the same provision of the 1928 edition Manual for Courts-Martial [Ex. O. 4773], the predecessor the present Manual. Paragraph 30 of the 1928 Manual contains practically identical wording, except that immediately after "Department" is inserted: "for example, retired personnel not on active duty, or military attaches . . ."

C. This Suit Could Not Properly Be Brought Outside of the District of Columbia.

The trial courts of the District of Columbia, presently the District Court for that District, have always had two advantages in dealing with suits seeking relief against government officials. First, they possess not only the same Federal jurisdiction as other Federal courts, but they also have the general jurisdiction derived from the Kings Bench, as exercised in the State of Maryland at the time of the cession of the District. This included the ancient powers to issue extraordinary prerogative writs against officials.

Kendall v. United States, 12 Peters 524;
United States v. Schurz, 102 U. S. 378;
See: *Smith v. Whitney,* 116 U. S. 167, 175.

Particularly the issuance of mandamus against officials by those courts has become accepted practice.

See: *Clackamas County v. McKay,* 219 F. 2d 479, vacated as moot, 349 U. S. 909.

Second, the "official residence" of heads of departments is Washington, D. C., so that there is obvious *in personam* jurisdiction by personal service.

Butterworth v. Hill, 114 U. S. 128;
But see: *Miley v. Lovett,* 193 F. 2d 712.

Thus it would appear from recent cases that appellant could bring suit in the District of Columbia in the District Court to review his court-martial sentence on grounds of lack of jurisdiction, if it should become final.

Harmon v. Brucker, 355 U. S. 579;
Jackson v. McElroy, 163 Fed. Supp. 257.

Also, he is expressly allowed to sue the United States in the Court of Claims for his pay and raise the same issues.

See: *Allen v. United States,* 91 Fed. Supp. 933;
Fly v. United States, 100 Fed. Supp. 440.

It appears that in between the situations where a suit so affects the sovereign that the sovereign itself must be a party, and the situations where suit can be brought against any individual subordinate for relief (as in habeas corpus cases, which are really a mode of review; see: *Larson v. Domestic and Foreign Corp.,* 337 U. S. 682, 690), there is an in between situation where under one rationale or another, suits are allowed against the proper party in the District of Columbia but not elsewhere. Professor Moore in his "Federal Practice" at Section 19.16 after discussing *Williams v. Fanning* states:

> "A practical consideration, not stressed in the Williams case, but long recognized as important in this field, has been whether the character of the subject matter of litigation and the type of officer before the court makes it reasonable to proceed to an adjudication of the issues without forcing the plaintiff into a distant forum to litigate with the superior. The practical issue is whether the citizen must go to the seat of the government; or whether government must come to him. Only where the subject matter of litigation has considerable governmental importance —rises considerably beyond routine matter, or where action is sought which only the superior can give, as the issuance of a land patent or the disbursement of funds under his control, should the citizen be forced to go to the government, normally to the District Court of the District of Columbia."

The practical reasons for confining such exceptional jurisdiction to a single court at the seat of the government, is partly a matter of convenience, in cases where suit elsewhere would be a disproportionately great inconvenience to the government. But a strong additional reason is that where the subject of a suit has "considerable governmental importance" or rises beyond the "routine" particularly, for example, where a court would have before it the validity of technical and delicate personnel status relationships between an individual officer and the government, matters which by their nature demand a uniformity of treatment throughout the government without regard or reference to place, State, District, etc., proper judicial administration favors the avoidance of an "inverted triangle" situation where differences of opinion among the Districts and Circuits could create territorial diversity of decision in types of cases where it is particularly undesirable.[10] While, in theory, all "Federal" cases could be appealed to the Supreme Court to obtain uniformity of decision in the end, as a practical matter considerable diversity in detail remains. In those special situations where a lesser degree of such diversity is desirable the only way it can be achieved is to confine the particular subject matter to a particular line of inferior courts, whose decisions, at least, will be binding on the whole government through its highest officials and will, presumably, be consistent with themselves. There is nothing unusual about the reason advanced here; in reality it is the same reason, but in greater degree, as was given for the necessity of having a system of Federal Courts in the first place for the trial of "Federal" cases, rather than leave such cases to the

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[10]For example: compare *Jackson v. Taylor,* 234 F. 2d 611, aff'd 353 U. S. 569, with *DeCoster v. Madigan,* 223 F. 2d 906.

diverse decisions of the courts of the states. Alexander Hamilton, in No. 80 of the Federalist Papers, wrote:

> ". . . The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Also see: *In re Tarble,* 13 Wall. 397, 403.

D. There Was No Jurisdiction Under the Circumstances to Treat the Suit as a Petition for a Writ of Habeas Corpus.

Appellant in the amended complaint expressly disclaimed any reliance upon habeas corpus jurisdiction to sustain his case. But if the facts make out a case for habeas corpus, it would seem that the disclaimer might be disregarded as a mere conclusion from the facts. In any case, it is clear that, if the jurisdictional facts exist, then there is jurisdiction, regardless of the disclaimer, and vice-versa if the jurisdictional facts did not exist: jurisdiction could not exist by agreement.

Generally in order to sustain habeas corpus, the petitioner must be in custody or under detention, at least so that the respondent served with the writ or process can obey the order to produce the "body" in court.

Wales v. Whitney, 114 U. S. 564;
Biron v. Collins, 145 F. 2d 759.

Wales was Surgeon General of the Navy, who was ordered by the Secretary of the Navy, Whitney; "You are hereby placed under arrest, and you will confine yourself to the limits of the city of Washington," pending court-martial. It was held that the mere order alone, under the circumstances, did not put Wales under such custody

or threat of custody as would support a Writ of Habeas Corpus. In *Biron v. Collins* the petitioner was ordered by his draft board, in Alabama, to report for "civilian work," in lieu of military service, in Colorado, and the respondent was the local draft board in Alabama. It was held that respondent had no possible custody over petitioner; and that under the cases, the only proper party who could threaten to hold petitioner in custody so as to be a sufficient respondent was the authority in Colorado to whom the petitioner had the duty to report, as in the similar case of a person inducted into the military service: the proper party is the Commanding Officer to whom there is the duty to report for service.

On the other hand, where a person already is in the status of "member" of a military unit or organization on full active military duty,[11] it has been held that the duty status itself is sufficient to be considered custody, without actual physical confinement being necessary.

This point is assumed so often in habeas corpus cases reviewing Selective Service inductions for example, that it is difficult to find it discussed. In general, habeas corpus is the "post induction remedy," without reference to physical custody.

United States v. Estep (C. A. 3), 150 F. 2d 768, rev'd on other grounds, 327 U. S. 114;

Witmer v. United States, 348 U. S. 375;

Peck v. Carpenter (D. C., Cal.), 120 Fed. Supp. 560.

In the military service, persons on "active duty" are subject to obligations unknown to persons not on such

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[11]Defined at 10 U. S. C. 101(22); court-martial jurisdiction over this category is granted by 10 U. S. C. 802(1).

duty. The principle characteristic of the service is that when a person is on active duty he is assigned to a "unit" or "organization" and given a place of "duty" and a time when to be on such duty. Unlike in civilian employment, and in civil life generally, the obligation of being at and remaining at the place of duty at the proper time, all the time, is enforceable by penal sanctions for its violation. (See for example: 10 U. S. C. 885, 886, 887, 913.[12]) This is but a special facet of the general obligation that, in the military, one must obey orders under pain of penal sanctions. Thus, in matters entirely unconnected with any restraint imposed as part of any court-martial proceeding, one's everyday freedom of movement is ordinarily limited to the "unit," "base," "station," "ship," etc., where one has his duty.

Thus, the commanding officer who has in his power such everyday control over a petitioner in the ordinary course of duty, is a sufficient party to respond to the court's orders.

See: *Boscola v. Bledsoe,* 152 Fed. Supp. 343, aff'd (C. A. 9), 245 F. 2d 955.

In our present case, it is very clear that appellant as a retired Rear Admiral was not assigned to, under, or on duty with the Eleventh Naval District, or otherwise under the command of appellee in the sense that active-duty members of the Navy in the Eleventh Naval District are under appellee's command. Perhaps the Secretary of the Navy could delegate authority to appellee to attempt to exercise command over appellant at the time of the court-martial. Suffice to say that this was not done. In none of the other ways customary in the mili-

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[12]Compare 18 U. S. C. 3146.

tary was appellant bound to report to appellee; nor did he need appellee's permission or authority, or travel or transfer orders of any kind, should he decide to remove himself to some other place in the country.

While appellant can be termed a "member" of an Armed Force of the United States, his membership is "at large" as it were, since he is a part of no unit, or organization less than the Department of the Navy itself. As for his "place of duty" in his retired status, its limits are no less than the whole of the United States itself, or the whole world for that matter. There is no way for appellee to respond to a Writ of Habeas Corpus, because under the relationships stated, appellee has no control over the movements of appellant and indeed has no way of knowing whether appellant remains within this part of the country, unless informed by his superior, the Secretary of the Navy. Suppose appellant were at this moment in New York City, and there is nothing in the record to show he is not, how could appellee possibly be held to have him in custody? There is no showing here that appellee has ever retained any command control, even if he ever had it over appellant in the first place, wherever appellant might travel; thus the case is different from *Ex parte Endo,* 323 U. S. 283. Plainly, the only sufficient respondent who could guarantee the custody of appellant, wherever he might be, is the Secretary of the Navy (or the Secretary of Defense) himself who can be sued in Washington, D. C., in the District Court.

Day v. Wilson (C. A., D. C.), 247 F. 2d 60;
Girard v. Wilson (D. C., D. C.), 152 Fed. Supp. 21, rev'd in part, 354 U. S. 524.

From the record in this case it is apparent that at no time was any attempt made to impose, confinement, arrest, restriction, or any other such limitation upon appellant, before or after the court-martial trial. He was served with a copy of the charges prior to trial and was ordered to attend, and he did so voluntarily. Afterwards, the sentence not extending to death or imprisonment, there could be no further occasion for any restraint.

There can be no threat of any increase of the court-martial sentence in any future action that may be taken with respect to it, because it could not be increased to include any confinement where none was adjudged.

United States v. Stene, 7 U. S. C. M. A. 277;
United States v. Kelley, 5 U. S. C. M. A. 259.

At this stage of the case, appellant is in no better position than was the petitioner in *United States ex rel. Goodman v. Roberts* (C. A. 2), 152 F. 2d 841. In that case the petitioner, a draftee, was transfered out from under the command of the respondent before the writ was served. Held: the writ would not lie because the petitioner was not in the respondent's custody. The same result must occur here.[13]

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[13]Query: suppose appellant had not attended the court-martial arraignment and trial voluntarily? Courts-martial use traditionally criminal procedure, even if the sentence does not extend to death or confinement; thus the accused's presence is absolutely necessary at the inception of the proceedings, when the court-martial is sworn, during the challenges and through the arraignment. (See MCM, App. 8, pp. 501-508.) Thus physical custody may have been used had appellant failed to attend.

2.

Under the Circumstances of the Case, It Was Properly Determined as a Matter of Law That Appellant Should Have No Relief in the Court Below Because of His Failure to Exhaust the Military Appellate Remedies Available to Him.

Even aside from the jurisdiction, venue and indispensable party questions discussed above, appellant should not be allowed to maintain his suit at the present time even were it bought in a court which would otherwise have jurisdiction. Of course appellant is attacking the constitutionality, as a matter of law, of 10 U. S. C. 802(4), as generally applicable, not only as applicable to himself. If this were a habeas corpus case and if appellant were in custody or detained under a sentence providing for imprisonment, or some other form of custody, actual or constructive, or if he were in any way at the present time being deprived of any present right of any kind, then there would be grounds for saying that, under the most recent cases, exhaustion of military appellate remedies in the court-martial case would be unnecessary.

Toth v. Quarles, 350 U. S. 11;
Guagliardo v. McElroy (C. A., D. C.), ... F. 2d ....., No. 14304, Sept. 12, 1958;
Reid v. Covert, 354 U. S. 1.

The whole difference between this case and the cases cited however is that in those there is imprisonment pending trial, or imprisonment under a sentence providing for such. The petitioners were of course being deprived of a valuable present right, to secure which, the military appellate remedies were deemed to be inadequate by the nature of the issue, allowing immediate resort to habeas corpus. In the present case however appellant has at no time been deprived of his liberty, or of anything else. How can he

be said to be deprived of personal liberty if he has the liberty to live wherever he desires, in the whole country, as discussed above? Furthermore, appellant can lose nothing at all of his pay or his status as a retired officer until the sentence of the court-martial is finally approved and ordered into execution. (10 U. S. C. Sec. 857(c).)

As will be seen from the opinion of the Court of Military Appeals, the court-martial case is not finally disposed of, but the case has been returned to a lower step in the Court-Martial Appellate hierarchy for further proceedings under 10 U. S. C. Sections 861 and 864.[14]

This case should be governed therefor, so far as exhaustion or remedies is concerned, by other case authorities which involve property or other rights, instead of deprivation of personal liberty. It is held that even where constitutional questions are raised the remedies provided must be exhausted before resorting to court in such cases. (*Allen v. Grand Central Aircraft Company,* 347 U. S. 535; *Aircraft and Diesel Corporation v. Hirsh,* 331 U. S. 752; see: *Burford v. Sun Oil Company,* 319 U. S. 315, rehear. den. 320 U. S. 214.) Absent the considerations in *Toth v. Quarles, supra,* and like cases, the doctrine of exhaustion of remedies applies with full force to court-martial cases.

Gusik v. Schilder, 340 U. S. 128.

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[14]As will be seen from the authorities cited by the Court of Military Appeals there are in courts-martial procedure not one but *three* "trials of the fact": not only the court-martial but also the convening authority and the Board of Review must be convinced "beyond reasonable doubt," as well as of the legal sufficiency of the evidence. The Court of Military Appeals was satisfied on the legal question; however, it was dissatisfied with the conduct of the second step, that is, the convening authority's consideration of reasonable doubt and appropriateness of sentence. It should be noted that the convening authority and the Board of Review have powers over the appropriateness of the sentence which are unknown to appellate tribunals outside of the military.

3.

The Trial and Sentence of Appellant by General Court-martial Was Not in Violation of the Constitution of the United States.

A. Retired Officers of a Regular Component of the Armed Forces Entitled to Receive Pay Are Members and Officers of the Armed Force Concerned and Are Military Officers of the United States, the Same as Those on Active Duty.

Aside from the preliminary questions of indispensable parties, jurisdiction and exhaustion of remedies, we have no doubt that the court-martial sentence pronounced against appellant, to be dismissed from the Service and to forfeit all his pay and allowances is constitutional. We have in this connection the unanimous opinion on the point recently rendered in the court-martial case by the United States Court of Military Appeals which is printed in the Appendix to this Brief. It would be redundant to repeat the same arguments and authorities which appear in that opinion, and we adopt it in full and refer this Court to it for argument on this point.

There are some additional observations which should be made, however, in addition to the ground covered by the Court of Military Appeals. The status of retired officers of the Armed Forces as being properly subjected to the military jurisdiction is made clear beyond any doubt when one considers the history of the establishment of the military retirement system. We refer the Court to a recent study of the status, composition, character and traditions of the Armed Forces of the United States, the recent book, "The Soldier and the State" by Professor Samuel P. Huntington, Harvard University, 1957. While this is not a strictly "legal source" we ask the Court to

take notice of it and certain matters contained therein which illustrate the history of the status of retired officers.[15]

In discussing the personnel situation in the regular Armed Forces of the United States prior to the Civil War, Professor Huntington makes the following comments on page 207 of his book:

> "* * * The absence of a retirement system in the Army and the Navy caused officers to hang on to their posts until they died in their boots, holding up the advancement of juniors. The Navy received a limited retirement system in 1855, but the Army had to wait until after the Civil War."

In a further discussion in the chapter entitled "The American Military Profession," at page 246 of his book, Professor Huntington states as follows:

> "Prior to 1855 no retirement system existed in either the Army or Navy. In that year, however, Congress, persuaded of the necessity for cleaning out the upper ranks of the Navy, created a 'reserved list' for officers incapable of duty. In 1861 Congress approved a continuing scheme of compulsory retirement of Army and Navy officers for incapacity and introduced the first provisions for voluntary retirement. Subsequent legislation in the 1860's and 1870's required the compulsory retirement of naval officers at the age of sixty-two and attempted to stimulate voluntary retirements by increasing retirement benefits. Legislation in 1862 and 1870 provided that Army officers could retire on their own application after thirty years of service or by compulsion at the discretion of the President. Manda-

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[15]This book has been reviewed in 71 Harvard Law Review, 391 (Dec. 1957) and 67 Yale Law Journal 164 (Nov. 1957).

tory retirement at the age of sixty-four, a reform long advocated by professionally minded officers, was finally enacted by Congress in 1882.[20] By the end of the century both services had adequate professional systems of superannuation."

"[20]Act of Feb. 28, 1855, 10 Stat. 616; Aug. 3, 1861, 12 Stat. 289. For the Navy: Acts of Dec. 12, 1861, 12 Stat. 329; July 16, 1862, 12 Stat. 587; July 28, 1866, 14 Stat. 345; July 15, 1870, 16 Stat. 333; March 3, 1873, 17 Stat. 547, 556; March 3, 1899, 30 Stat. 1004. For the Army: Acts of July 17, 1862, 12 Stat. 596; July 15, 1870, 16 Stat. 317, 320; June 30, 1882, 22 Stat. 118; Emory Upton, 'Facts in Favor of Compulsory Retirement,' United Service, 11 (March 1880), 269-288, III (December 1880), 649-666, IV (January 1881), 19-32."

The original Act of February 28, 1855, 10 Stat. 616 which first established the "reserved list" in the Navy originated as Senate Bill No. 568, a "Bill to promote the efficiency of the Navy," in the 33rd Congress, 2d Session. The Bill was strongly debated in the House of Representatives before being finally passed,[16] and there was considerable opposition expressed to it on various grounds, among them being that it would deprive officers of their "rights."

Prior to that time, officers of advanced age were actually not given any strenuous duties and were allowed to stay on shore practically the same as if they had been retired.

Due to dissatisfactions and deficiencies under the retirement procedure used under the 1855 law, Congress modified it in the Act of January 16, 1857, 11 Stat. 153.

Finally, with the Act of August 3, 1861, 12 Stat. 287, 290, 291, Congress enacted the system of retirement

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[16]Congressional Globe, 33rd Congress, 2d Session, pages 708 to 714.

which was the beginning of the pattern which exists today in the Armed Forces. The retirement provisions of the 1861 Act were only passed however after considerable debate. They were finally enacted as consolidated in the Bill entitled "A Bill providing for the better organization of the military establishment," Senate Bill No. 3, 37th Congress, 1st Session. The purpose of the Act was to recognize legally what was in actually the fact: that many, if not the majority of the officers of the highest ranks of both the Army and the Navy were beyond an age and length of service at which they were capable of useful service, at that time, under strenuous wartime conditions; and that there was no use keeping every officer all his life theoretically liable for full service and to be paid for such status when it was so well known that those who were too old could render only limited services, if any at all. An exception however was made for those officers who were over the proposed age limit, but who were nonetheless able so that they could be called to duty or retained on duty.[17]

Strenuous opposition was voiced however to the very idea of having a retired list for the Army.[18]

However, Senator Henry Wilson of Massachusetts succinctly stated the reason for the Bill, as it related to the Army:

> "The truth is, and if you take the Army Register, and examine it carefully, you will find it so, that as you approach towards the head of the Army, your officers are paralyzed by age."[19]

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[17]A familar example is Lt. General Winfield Scott who was in his 70's but nevertheless was Commanding General of the Army for a substantial time at the beginning of the Civil War.

[18]Particularly by Senator John P. Hale of New Hampshire. See Congressional Globe, 37th Congress, 1st Session, pages 158, 161.

[19]*Id.*, page 162.

And again, he stated:

> "The senator says that Majors in the Army are before the enemy to-day commanding divisions . . .
>
> "It is because your old officers of higher Command are unable to go into the field and take command. We have several officers—a large number in proportion to our Army—who are utterly incapable to go into the field; men from 70 to 85 years of age, worn out by disease . . .
>
> ". . . I think, by all means, these brave and true old officers who are unable to serve the country, should be placed quietly, peacefully, and honorably aside with a reasonable compensation, which I do not believe this nation will grudge; and that captains and majors, men who are to-day 60 years of age, who have served as captains 20 or 30 years; men, however, of vigor, may come forward and take the command of regiments or take their proper places with the Army of the country in the field. . . ."[20]

If we take the situation in the Navy prior to 1855 and the Army prior to 1861 when there were no retirement laws, manifestly, a regular Army Officer was subject to the military law like all other officers for his whole life unless he either resigned from the Service completely or was dismissed in the very manner of proceeding which appellant contests in this litigation. Suppose for example, Congress tomorrow repealed all the retirement laws and henceforth retained all regular officers in the military service on the active list for all their lives? Could it be seriously disputed that they would not be subject to court-martial jurisdiction? Admittedly, retired officers have duties of a very limited character, as pointed out else-

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[20] *Id.*, page 163.

where, which amount to substantially nothing more than drawing their pay every month and making known their location, presumably so that the pay can be dispatched to the proper address. In exchange for the fact that these duties are quite limited, the amount of pay is less than the full active duty pay, being not more than a maximum of 75 per cent of the basic pay. (See: 10 U. S. C. Secs. 1401, 6325(b)(2), 6326(c)(2), 6330(c), 6381(a)(2), 6383(c)(2), 6390(b)(2), 6396(d)(2), 6398(b)(2), 6399(c)(2), 6400(b)(2).)

It is to be observed that the mandatory retirement age set in the Civil War legislation was accompanied by the original provision subjecting retired officers to general courts-martial in the very same Act. It is very clear from the legislation and its history, however, that it was not contemplated that an officer ceased to be an officer of the military service upon his becoming retired although it was generally agreed that, above the mandatory limits, general military duties would not be required except in those instances specifically provided for. The limits themselves are of interest since it shows that, at all events, an officer was considered able for full active duty below that age.

Much has been added to the retirement laws of the services at the present day. In addition to the mandatory age and service limits which are substantially as first established (10 U. S. C. Secs. 3883-3886, 6390, 8883-8886), there has developed to the present time provisions of law which allow retirement of officers at much lesser ages and lesser lengths of service. These were primarily the result of the Great World Wars at the end of which the Armed Forces had many more officers of high ranks than were necessary for peacetime active

service. There also have been established retirement laws for enlisted persons based upon completion of 20 to 30 years' service (10 U. S. C. Secs. 1293, 1305, 3914, 6326, 8914). In the Navy and Marine Corps there is a hybrid form of retired status called the "Fleet Reserve" the eligibility for which requires attributes of service similar to those required for retirement (10 U. S. C. Secs. 6330, 6331).

For officers the most often used provisions of law since World War II have probably been those which allow officers to retire at the end of 20 years' service upon their application in the discretion of the Department concerned (10 U. S. C. Secs. 3911, 3912, 6323, 8911, 8912). It was under the predecessor version of Section 6323 that appellant applied for and was granted his retirement.

The point is this: can it possibly be said to be unconstitutional to have laws whereby persons who have spent all their adult lives in the military service, after a military education, but who are allowed to transfer to the limited status of "retired," being eligible therefor at an age which could be as low as 40, to receive pay in excess of 50 per cent of the base pay for the rank involved, continue to be subject to at least those provisions of military law which require adherence to certain fundamental standards of conduct, even if actual day to day attendance at duty is not required? Clearly those provisions of law which allow officers and enlisted men to retire after 20 years of service (or to be transferred to the "Fleet Reserve" at the end of the same length of service) do not contemplate that a person so transferred is not under an obligation to keep himself morally fit for further service to his country in his military rank and status. The case was eloquently stated by President Woodrow Wilson in the Veto Mes-

sage which is printed at length in the Court of Military Appeals Opinion in the appendix to this brief.

Perhaps it could be argued that Congress should change the laws so that after a retired officer reaches some mandatory upper age limit such as 60, 65 or even 70, he should thereupon become and be treated as a "mere pensioner" of whom no further military service is to be expected and whose pay thenceforth becomes a true annuity, or vested property right. That only serves to illustrate, however, that a person of the age and status of appellant both at the time of his retirement and at the time of the offenses and his court-martial trial was not to be considered a "mere pensioner."

Because it may be of interest to the Court to know the actual extent of the present jurisdiction under 10 U. S. C. Section 802(4), and the closely related provisions Section 802(6) which covers the "Fleet Reserve" and "Fleet Marine Corps Reserve," evidence was put into the record in the Court below in certificate form as to the approximate average numbers of persons in those categories in each Armed Force. The dates on which the figures were obtained vary from June to December, 1957 but from the nature of the categories it may be assumed that the numbers are relatively constant without great change. Thus we may list the numbers of persons who are retired regulars of the Armed Forces as follows, by Armed Force:

Army	—	58,453
Navy	—	56,025
Marine Corps	—	9,502
Air Force	—	17,056
Coast Guard	—	8,019

And for the Navy and Marine Corps, the numbers of Fleet Reserve and Fleet Marine Corps Reserve are:

Navy	—	20,871
Marine Corps	—	1,782

In comparison with this relatively small total of around 170,000 persons we may note that the presently authorized active strength of the Armed Forces is 5,000,000.[21] And the Court might also take judicial notice that since 1950 the actual strength of the active Armed Forces has varied between 3½ and 2½ million persons.[22] The categories of 10 U. S. C. 802(4) and 802(6) therefore could be described as a small group of fully professional military personnel of uniformly long active service who have devoted long careers to service in the Armed Forces. The numbers of persons who would be subject to jurisdiction under 10 U. S. C. 802(5), which concerns reservists while actually hospitalized in an Armed Forces hospital, is unavailable, though quite small, due to the nature of the category: the jurisdiction exists only while actually in the hospital.

B. The President of the United States Has the Constitutional Power to Terminate the Holding of a Military Office Under the Executive Branch.

The end result of the proceedings against appellant, if the sentence to dismissal from the Service is finally carried out, will be to terminate his status under the Government as an officer. It has been a settled principle ever since 1789 that, under his constitutional powers, the

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[21]64 Stat. 408 as amended by 71 Stat. 208.

[22]United States Bureau of Census, Statistical Abstract (1957), page 240.

President can terminate the office of any officer under the Executive Branch.

Myers v. United States, 272 U. S. 52.

At least the power cannot be doubted unless some specific exception to it is established by Congress such as for example of restriction upon removal of quasi-judicial officers of independent agencies.

Wiener v. United States, 357 U. S. 349.

So far as officers of the Armed Forces are concerned, the only statutory restriction Congress has ever imposed upon the President's prerogative was in the Act of July 13, 1866, 14 Stat. 92, which is now codified in 10 U. S. C. 1161, which specifies: "no commissioned officer may be dismissed from any armed force except—(1) by sentence of general court-martial" (see *Myers v. United States, supra,* pp. 160, 165). Prior to the passage of that statute, the Presidential power of dismissal had been exercised on numerous occasions.

Myers v. United States, supra, p. 201.

The only real issue that has ever been raised about 10 U. S. C. 1161 and its predecessors is whether Congress even has the power to pass such a statute, as a limitation on the President.

See: *United States v. Perkins,* 116 U. S. 483.

Obviously, the statute can act, if at all, only as a limitation upon what is otherwise an inherent power of the Executive. Therefore, how can it possibly be unconstitutional for the President to exercise his power under the strict procedure prescribed by statute, that is, by General Court-Martial, when he could validly do so under his inherent powers if there were no such statute? So far

then that appellant is an officer and member of the Armed Forces, that membership can be terminated subject only to the specific limitations prescribed by Congress.

See: *Schustack v. Herren,* 234 F. 2d 134.

Traditionally, a "dismissal from the Service" for an officer of the Armed Forces has meant something more than a mere termination of, or separation from, his office, since the term imports the same characterization of dishonor as is included in a dishonorable discharge given to an enlisted person.

United States v. Alley, 8 U. S. C. M. A. 559, 25 C. M. R. 63;

United States v. Bell, 8 U. S. C. M. A. 193, 24 C. M. R. 3;

United States v. Ellman, 9 U. S. C. M. A. 549, 26 C. M. R. 329.

Both kinds of "dismissal" however have always been equated; as is illustrated by the statutory provision which provides that an officer dismissed by order of the President may within a certain time demand a trial by General Court-Martial upon the grounds of his dismissal. (Act of March 3, 1865, Sec. 12, 13 Stat. 489; now reenacted as 10 U. S. C. Sec. 804.)

It was no doubt the grave effects of Presidential exercise of the power of dismissal by order alone which impelled Congress to add the limitation of a right to trial by General Court-Martial, with its comparatively elaborate degree of procedural protection for the rights of the officer concerned. It is difficult to see upon what constitutional grounds, however, it could possibly be asserted that a General Court-Martial, with its full protection of criminal trial procedure, is an unfit tribunal to try the

issue of dismissing an officer from the Service. It is certainly not less satisfactory, procedurally, than other modes provided for discharge or dismissal of government employees.

In conclusion, we think that the constitutionality of the dismissal and forfeiture of pay of appellant by sentence of General Court-Martial cannot be doubted. Certainly, if the office can be taken away, the pay which appertains to it can likewise. It has been held that the loss of office by a retired officer carries with it the loss of the pay.

Allen v. United States, 91 Fed. Supp. 933.

C. Retired Persons of Regular Components of the Armed Forces of the United States Entitled to Receive Pay Are Constitutionally Subjected to Trial by Court-Martial for Offenses Under the Uniform Code of Military Justice.

As we have stated previously we think the Court of Military Appeals in its Opinion has well covered the reasons for the existence of court-martial jurisdiction which we do not repeat in this brief. We would merely note however that the most recent Supreme Court cases on this general subject, *Toth v. Quarles,* 350 U. S. 11 and *Reid v. Covert,* 354 U. S. 1, dealing respectively with 10 U. S. C. Sections 803(a) and 802(11), are hardly in point when considering the constitutionality of Section 802(4) and (6), even when extended by the recent divided decision of the Court of Appeals of the District of Columbia in *Guagliardo v. McElroy, supra.*

On the other hand, this Court has recently reaffirmed the constitutionality of the provision which is now found in 10 U. S. C. Section 802(7). (*Lee v. Madigan,* 248 F. 2d 783, cert. gr. 356 U. S. 911.) By inferential dictum

even Justice Black would uphold the power asserted in 10 U. S. C. Section 802(10).

Reid v. Covert, supra, pp. 33-35.

And likewise at page 23 his Opinion states that:

> "There might be circumstances where a person could be 'in' the Armed Services . . . even though he had not formally been inducted into the military or did not wear a uniform."

From all that we have said, the case for jurisdiction of retired officers is incomparably stronger than for jurisdiction over military prisoners or over employees overseas.

Appellant relies so heavily upon *United States ex rel. Boscola v. Bledsoe,* 152 Fed. Supp. 343, affirmed by this Court, 245 F. 2d 955, that we are obliged to discuss that case and show its inapplicability to the present situation. In that case, the petitioners were retired regular enlisted members of the Navy restired under the predecessor of 10 U. S. C., Section 6326. They were ordered involuntarily to "full time active duty" with place of duty being the United States Naval Receiving Station, Seattle, Washington, and in addition were restricted in their place of duty to only a portion of that station. The decision of the District Court is only an authoritative statement of the proposition, which has never been doubted, that retired persons cannot be called into or placed upon "full time active duty," at a particular base, within the meaning of 10 U. S. C., Section 101(22), except under the criteria specified in the statute, namely, in "time of war," "national emergency," etc. Since the criteria were obviously not met, the active duty was illegal and the District Court in granting a Writ of Habeas Corpus did no more

than many other District Courts have done in granting Writs of Habeas Corpus in Selective Service induction cases where the person has been illegally inducted.

It is obvious, therefore, that the *Bledsoe* case has nothing to do with court-martial jurisdiction over retired persons and is not in point in our present case. The exercise or existence of jurisdiction over a retired person in his retired status has nothing to do with whether or not the person is on "active duty." The reason is very simple: If jurisdiction over a retired person for such an offense did not exist by reason of 10 U. S. C., Section 802(4) at the time of the offense, it could not possibly be created by any later acts of the parties under Section 802(1). Thus, it makes no difference in such a case even if the accused retired person voluntarily accepts active duty after he is charged with the offense and pending the court-martial proceedings. It is an elementary principle not requiring citation of authority in both military and civil courts that if jurisdiction does not exist over an offense at the time it is committed, it cannot be created by consent of the parties.

It has been customary in the military, in cases involving "members of the armed forces" who are not, however, assigned to "full time active duty" at a particular base, to call such a person to active duty at the base or place where the proceedings are to take place.

The reason for this, however, has nothing to do with the existence or exercise of jurisdiction over the offense. The reason is that it is an administrative convenience for all concerned under the circumstances to have the accused on full time active duty on an occasion when in all probability his attendance at the base on a full time basis is likely to be necessary. The benefit to the accused in ex-

change for the inconvenience of being tried is that on active duty he receives full pay and emoluments rather than the percentage of the pay that he receives in his retired status. There is some suggestion in the opinion in the *Bledsoe* case that court-martial proceedings were related to the active duty. However, we have no idea what the parties had in mind by their stipulation which apparently excluded from the consideration of the court the exercise or existence of jurisdiction over the petitioners under Section 802(4). Suffice it to say that as we pointed out above, the existence of court-martial jurisdiction logically could not have been involved in that case. For a recent example of voluntary call to active duty concurrent with exercise of jurisdiction over a "member of the armed forces," not otherwise on "full time active duty," see *Wheeler v. Reynolds,* 164 Fed. Supp. 951.

Respectfully submitted,

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APPENDIX.

[9 USCMA 637, 26 CMR 417]

United States Court of Military Appeals.

United States, Appellee, v. Selden G. Hooper, Rear Admiral (Retired), U. S. Navy, Appellant. No. 11,113.

On Mandatory Review

Decided September 26, 1956

Commander Charles Timblin argued the cause for Appellant, Accused.

Commander Louis L. Milano argued the cause for Appellee, United States. With him on the brief was *Commander Craig McKee.*

Opinion of the Court

Robert E. Quinn, Chief Judge:

The accused was convicted by general court-martial[1] of violations of Articles 125, 133 and 134, Uniform Code of Military Justice, 10 USC §§ 925, 933, 934, and was sentenced to dismissal and total forfeitures. The case is before this Court for mandatory review in accordance with Article 67(b) (1), Uniform Code, supra, 10 USC § 867.

At the outset of this review we are met, as were the tribunals below, with a defense claim that the court-martial had no jurisdiction over the accused. The factual basis for this position is undisputed.

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[1]WC NCM 57-00988

On December 1, 1948, upon Presidential approval, the accused was transferred to the Regular Navy retired list with the rank of Rear Admiral but with retired pay based on the rank of Captain, in accordance with the provisions of Title 34 USC §§ 410b and 410n.[2] While in this status, the offenses occurred, and the charges were preferred against him. He was informed of said charges April 15, 1957, by the Acting Commandant, 11th Naval District. After full investigation was held, as required by Article 32, Uniform Code, supra, 10 USC § 832, the Commandant, 11th Naval District, referred the charges for trial to a general court-martial convened at his direction. Thereafter, a copy of the charges was served upon the accused. No pretrial restraint was imposed. On May 6, 1957, the date set for trial, the accused, together with civilian counsel of his own selection, and appointed military counsel, appeared before the court-martial. Upon arraign-

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[2] § 410b. "When any offcer of the Regular Navy or the Regular Marine Corps or the Reserve Components thereof, including any member of the naval service temporarily appointed to commissioned grade whose permanent status is enlisted, has completed more than twenty years of active service in the Navy, Marine Corps, Army, Air Force, or Coast Guard, or the Reserve Components thereof, including active duty for training, at least ten years of which shall have been active commissioned service, he may at any time thereafter, upon his own application, in the discretion of the President, be placed upon the retired list on the first day of such month as the President may designate. As used in this section 'active commissioned service' includes all active service performed under a temporary appointment to a commissioned grade, including a commissioned warrant grade, by an officer whose permanent status is enlisted."

§ 410n. "All officers of the Navy, Marine Corps, and the Reserve components thereof, who have been specially commended for their performance of duty in actual combat by the head of the executive department under whose jurisdiction such duty was performed, when retired, except officers on a promotion list who may be retired for physical disability, shall, upon retirement, be placed upon the retired list with the rank of the next higher grade than that in which serving at the time of retirement and the grade in which serving at the time of retirement shall be construed to mean

ment, counsel interposed his challenge to the jurisdiction of the forum, but his contentions were denied. Rather than enter his pleas, the accused, as was his right, stood mute, so a plea of not guilty was entered as to each charge and specification.

The trial court relied upon Article 2 of the Uniform Code, supra, 10 USC § 802, as its source of jurisdiction. This provides, in pertinent part:

> "The following persons are subject to this chapter:
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> . . . . . .
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> (4) Retired members of a regular component of the armed forces who are entitled to pay; . . ."

Neither by its express terms nor by any related provision of the Code, or other Congressional enactment, are any limitations or conditions put upon the exercise of the jurisdiction thus conferred. Hence, if this section is not contrary to the Constitution, it authorizes the proceedings in this case.

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the highest grade in which so serving whether by virtue of permanent or temporary appointment therein: *Provided,* That all officers heretofore and hereafter holding rank or grade on the retired list above that of captain in the Navy or colonel in the Marine Corps solely by virtue of such commendation, if hereafter recalled to active duty, may, in the discretion of the Secretary of the Navy, be so recalled either in the rank or grade to which they would otherwise be entitled had they not been accorded higher rank or grade by virtue of such commendation, or in the rank or grade held by them on the retired list: *Provided further,* That the provisions of this subsection shall not apply in the case of any officer who has been so commended if the act or service justifying the commendation was performed after December 31, 1946: *Provided further,* That nothing in this subsection shall be construed to increase the retired pay of officers heretofore or hereafter placed upon the honorary retired list for the Naval Reserve: *Provided further,* That officers of the classes described in this subsection who have been retired prior to August 7, 1947, shall be entitled to the benefits of this subsection from August 7, 1947: *And provided further,* That nothing in this subsection shall be held to reduce the retired rank or pay to which an officer would be entitled under other provision of law."

The defense argues, however, that jurisdiction over retired naval officers, such as the accused, cannot attach in the absence of an order effecting their return to active duty; that if the order directing trial is considered an order to active duty, it conflicts with 10 USC § 6481,[3] for it was not issued by the Secretary of the Navy, in time of war or national emergency declared by the President, nor with the consent of the officer concerned.

We cannot, consistently with well-established rules of statutory construction, accept this view. Engrafting such a requirement upon Article 2(4) would nullify its provisions completely. Article 2(1) makes all persons on active duty subject to the Code in the following language:

> "The following persons are subject to this chapter:
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> (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call or order to obey it."

An officer recalled to duty from the retired list of a regular component is subject to the Code by virtue of this provision alone. It necessarily follows from this that if Article 2(4) requires the individual be recalled as a condition

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[3]10 USC § 6481. "In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the Regular Navy or the Regular Marine Corps to active duty at sea or on shore. At any other time the Secretary may order such a retired officer to active duty at sea or on shore only with his consent."

precedent to its effectiveness, its provisions are entirely unnecessary and could never be operative.

In this particular, 50 Am Jur, Statutes, § 359, notes:

> "It should not be presumed that any provision of a statute is redundant. To the contrary, it is to be presumed that one paragraph or word of a statute is not a needless repetition of another, and courts should hesitate in ascribing careless and needless tautology to the lawmaking body. Hence a construction will be avoided which would render a part of a statute superfluous, or which would give to a particular word or phrase the same meaning as the word or phrase preceding it, so that the latter adds nothing to the statute."

See also United States v. Bledsoe, 152 F Supp 343 (WD Wash) (1956).

The *Bledsoe* case, supra, relied on by the defense as an additional authority for its position that jurisdiction did not lawfully attach, is inapposite. There, retired enlisted men were recalled to active duty solely for the purpose of appearing before a court-martial for trial upon charges arising out of their activities while in a retired status. The suit was instituted to release the accused from their physical restraint and did not pass on the question of the jurisdiction of the naval service to try them under the Article here involved. The court held that a call to active duty for that single purpose was contrary to the statute relied upon.[4] Upon appeal, this conclusion was affirmed by

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[4] "The Secretary of the Navy is authorized in time of war, or when a national emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the pay and allowances authorized by section 26 of Title 37, except as otherwise provided in the next section." 34 USC § 433 (March 3, 1915, c. 83, 38 Stat 941; August 29, 1916, c. 417, 39 Stat 591).

the United States Court of Appeals for the Ninth Circuit. 245 F 2d 955 (1957). Although the result reached by the Circuit Court of Appeals, Second Circuit, in United States v Fenno, 167 F 2d 593 (1948), in a substantially similar case, is apparently contrary to that expressed in the *Bledsoe* opinion, we are not called upon to decide the question, for in this case, the accused was neither restrained nor recalled to duty. He appeared in person before a general court-martial, the processes of which were begun by charges duly preferred and served upon him. If the accused is personally subject to court-martial jurisdiction under the Constitution and the Uniform Code, these successive steps were sufficient for jurisdiction to attach and authorize the court-martial to proceed to trial. Barrett v Hopkins, 7 Fed 312 (CC D Kan) (1881); In re Walker, 3 Am Jurist 281; In re Carver, 103 Fed 624 (CC D Maine) (1900); United States v Reaves, 126 Fed 127 (CA 5th Cir) (1903).

In Closson v Armes, 7 App DC 460, Captain Armes, an officer on the retired list, sent an offensive letter to Lieutenant General Schofield, then commanding the Army of the United States and acting as Secretary of War. General Schofield ordered Armes' arrest and confinement upon charges arising therefrom. This order was carried out. The Court of Appeals for the District of Columbia upheld the arrest in an opinion in which, after alluding to the statutory basis for jurisdiction over the officer, it declared:

> "The appellee, therefore, being an officer of the army, although on the retired list, and subject as such to trial by court-martial for violation of the articles of war, and the charges against him being for offences against those articles, such as have been stated, his arrest to answer those charges was right and proper.

> Actual arrest, or some equivalent of it, is an essential prerequisite under our system of criminal jurisprudence to the exercise of jurisdiction by any court having cognizance of criminal causes. It is an elementary principle in our law that no man is to be tried for crime in his absence. The arraignment of an accused person in court to hear the charge against him and to respond to it is essential to give validity to any proceeding thereon against him; and the only mode known to our law to secure the presence of such accused person for the purpose is by arrest. It is very true that an accused person may come in and voluntarily surrender himself; and that thereupon a court may proceed without the usual preliminary arrest. *But upon his surrender, he is in fact, and in contemplation of law, under arrest, and subject to detention.*" [Emphasis supplied.]

The final phase of the defense argument raises the applicability of the 5th Amendment to the Constitution. He contends that if Article 2(4) of the Code, supra, is considered without reference to other provisions, "it would seem to permit a military commander to snatch a retired regular off the streets and thrust him before a court-martial." Of course, this accused was not "snatched off the streets" nor was he "thrust before a court-martial." After due notice of the charges, he voluntarily appeared before the court-martial. Thus, there is found in this case none of the brutal and shocking circumstances suggested by the defense. If such circumstances ever operate to deprive a tribunal of its otherwise lawful authority, the accused here is in no position to avail himself of such a rule.

The Fifth Amendment of the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury *except in cases arising in the land or naval forces,* or in the militia, when in actual service in time of war or public danger; . . ." [Emphasis supplied.]

The sole problem left for resolution is whether or not the accused, as a retired member of a regular component of the Armed Forces entitled to receive pay, is a part of the "land or naval forces."

Courts which have heretofore expressed opinions on this question have concluded that retired personnel are a part of the land or naval forces. In arriving at this conclusion, each, with the exception of United States v Fenno, supra, appear to have assumed that being a part of such forces, court-martial jurisdiction necessarily attaches to them.

The Court of Claims has held retired personnel a part of the military force of this country. Tyler v United States, 16 Ct Cl 223; Runkle v United States, 19 Ct Cl 396; Franklin v United States, 29 Ct. Cl 6. When the *Tyler* case, supra, was before the United States Supreme Court, that tribunal, speaking through Mr. Justice Miller, declared:

> "It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, *who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules,*

and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service." [United States v Tyler, 105 US 244, 26 L ed 985. Emphasis supplied.]

In Closson v Armes, supra, the Court of Appeals of the District of Columbia, stated:

"This case is not that of a civilian ruthlessly imprisoned by arbitrary military authority. The appellee is an officer of the army of the United States, entitled to wear its uniform and to draw pay as such, and by express provision of the statute law of the United States for the government of the army, made subject to the rules and articles of war, and to trial by court-martial for any infraction of those articles. Rev Stats US, sec 1256. Nor is the force of the statute broken by the fact that the duties of a retired officer, such as the appellee is, are of an exceedingly limited character, being restricted substantially to drawing his pay, reporting his place of residence to the War Department monthly, and being assignable to duty at the Soldiers' Home, and, at his own request, to duty as professor in any college; and that, subject to these restrictions, a retired officer of the army may enter into any private business into which he chooses to embark, not inconsistent with his duties to the United States. In the nature of things, some of the articles of war cannot apply to retired officers, for the reason that either in express terms or by necessary implication, they concern the duties of those in active service. But so far as the articles of war can be applicable to the retired officer of the army, the statute unquestionably makes these latter subject to them and to all the processes of the military law for all offences committed by them in violation of those articles."

In United States v Fenno, 167 F 2d 593, the Circuit Court of Appeals for the Second Circuit, discussing an earlier statute making members of the Fleet Reserve subject at all times to the laws, regulations, and orders for the government of the Navy[5] stated:

> "Nor do we find this statute to be unconstitutional. The Fleet Reserve is so constituted that it falls reasonably and readily within the phrase 'naval forces' in the Fifth Amendment. Its membership is composed of trained personnel who are paid on the basis of their length of service and remain subject to call to active duty. While keeping Fleet Reservists on such pay, Congress has, to be sure, also allowed them to accept employment in civilian capacities. But this need not, and does not, materially diminish their obligations as members of the Fleet Reserve. During the time they are on inactive duty, they remain immune from discharge, with its accompanying loss of pay, except as the statute provides. The government at the same time obtains the benefit of having a trained body of men subject to recall to active duty when needed. To exclude Fleet Reservists while in this status from a classification within the 'naval forces' would be, we think, to construe the broad terms of the Fifth Amendment much too narrowly."

Not without significance is the language of President Wilson in his veto of a measure which would have terminated amenability of retired personnel to trial by court-martial. This is what he said:

> "The original act establishing the retired list of the Army (act of Aug. 3, 1861) referred to the personnel therein included as only partially retired, and provided

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[5]34 USC (1946 ed) § 853(d).

that a retired officer should be entitled to wear the uniform of his grade, should be borne on the Army Register, and should be subject to the rules and Articles of War, and to trial by general court-martial for any breach of these articles. By the act of July 24, 1876, officers of the Army on the retired list were specifically declared to constitute a part of the Regular Army, a provision which is found repeated in subsequent acts affecting the organization of the Army; and other statutes enacted during this period made retired officers of the Army available for certain classes of active duty, in time of peace with their consent, and in time of war without their consent. By the recently enacted national defense act, the authority of the President over retired officers has been further extended so as to make them subject to his call in time of war for any kind of duty without any restriction whatever. Courts and Attorneys General have in a long line of decisions held that officers of the Army on the retired list hold public office. It thus appears that both the legislative and judicial branches have drawn a sharp distinction in status between retired officers, who are regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength, and mere pensioners, from whom no further military service is expected. Officers on the retired list of the Army are officers of the Army, members of the Military Establishment distinguished by their long service, and, as such, examples of discipline to the officers and men in the active Army. Moreover, they wear the uniform of the Army, their education and service hold them out as persons especially qualified in military matters to represent the spirit of the Military Establishment, and they are subjected to active duty in time of national emergency by

the mere order of the Commander in Chief. They are, therefore, members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirit of the entire Military Establishment before the world. Occupying such a relation, their subjection to the rules and Articles of War and to trial by general court-martial have always been regarded as necessary, in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President.

"The purpose of the Articles of War in times of peace is to bring about a uniformity in the application of military discipline which will make the entire organization coherent and effective, and to engender a spirit of cooperation and proper subordination to authority which will in time of war instantly make the entire Army a unit in its purpose of self-sacrifice and devotion to duty in the national defense. These purposes can not be accomplished if the retired officers, still a part of the Military Establishment, still relied upon to perform important duties, are excluded, upon retirement, from the wholesome and unifying effect of this subjection to a common discipline. I am persuaded that officers upon the retired list would themselves regard as an invidious and unpalatable discrimination which in effect excluded them from full membership in the profession to which they have devoted their lives, and of which by the laws of their country they are still members. So long as Congress sees fit to make the retired personnel a part of the Army of the United States, the constitutionality of the proposed exemption of such personnel from all liability under the Articles of War is a matter of serious doubt, leaving the President, as it does, without

any means sanctioned by statute of exercising over the personnel thus exempted the power of command vested in him by the Constitution.

"Convinced, as I am, of the unwisdom of this provision and of its baneful effect upon the discipline of the Army; doubting, as I do, the power of Congress wholly to exempt retired officers from the control of the President, while declaring them to be a part of the Regular Army of the United States, I am constrained to return this bill without my approval." [53 Congressional Record 12844.]

Colonel Winthrop, while expressing strong doubts about jurisdiction over civilians generally, had this to say about jurisdiction over retired personnel:

"That retired officers are a part of the army and so triable by court-martial—*a fact indeed never admitting of question*—is adjudged in Tyler v U. S., 16 Ct Cl, 223; Id., 105 US 244 . . ." [Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, page 87, footnote 27. Emphasis supplied. See also 29 Op Atty Gen 503.]

Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health. Certainly, one who is authorized to wear the uniform of his country, to use the title of his grade, who is looked upon as a model of the military way of life,

and who receives a salary to assure his availability, is a part of the land or naval forces.

Left for determination is the applicability of the Articles herein involved to one in a retired status. Certainly conduct unbecoming an officer and gentleman—the subject of Charge II—and conduct of a nature to bring discredit upon the armed forces—the subject of Charge III—are offenses which do not depend upon the individual's duty status. Sodomy, the subject of Charge I, in an offense involving moral turpitude, and without doubt necessarily applies to all subject to military law without regard to the individual's duty status.

For the foregoing reason, we hold that the court-martial had jurisdiction over this accused.

The remaining assignments of error present little difficulty and may be disposed of readily. The accused contends that agents of the Office of Naval Investigation procured certain evidence against him in violation of the Fourth Amendment to the Constitution. This evidence consists of the agents' accounts of their observation of the accused's activities while they held his home under surveillance from a neighboring dwelling. Permission to use the latter dwelling for such purpose was obtained from the owners, and at no time did the agents' physically go upon the premises occupied by the accused. Such surveillance does not amount to a search, and an unwarranted invasion of privacy is not involved. McDonald v United States, 335 US 451, 93 L ed 153, 69 S Ct 191; Fisher v United States, 205 F 2d 702 (CA DC Cir); Love v United States, 170 F 2d 32 (CA 4th Cir); Paper v United States, 53 F 2d 184 (CA 4th Cir). Furthermore, no objection was made to this evidence at trial. This failure

precludes consideration of the question at this level. United States v Dupree, 1 USMCA 665 5 CMR 93.

In a further assignment, the defense argues that the evidence is legally insufficient to support the findings upon the specification of Charge III. This argument is predicated entirely upon the validity of the foregoing assignment, which we have held lacking in merit. Thus, it need not be further discussed.

Alleged improprieties in the trial counsel's opening statement are the basis of the next defense assignment. We have examined with care both the opening statement and all of the evidence presented at the trial. While the record does not bear out each and every item which the prosecutor said he expected to prove, in exactly the manner described, the general import of the evidence is consistent with the opening remarks. In any event, whatever variance existed between them is entirely too slight to have any noticeable effect upon the triers of fact. The most important of the variance alleged is that relating to the witness McDaniels. This individaul testified that after he was first interrogated by naval investigators, he advised the accused. A meeting between the pair was then arranged in a San Diego restaurant where the details of the interrogation were discussed. According to McDaniels, the accused advised him that if "he [the accused] was convicted of anything, that we would all be drug down by it." He then informed McDaniels he could disavow his earlier statement and deny that the acts he had described had ever occurred inasmuch as the first statement was not under oath. McDaniels then acknowledged that at the pretrial investigation he denied the accused's complicity in any of the offenses, and in so doing committed perjury.

In their testimony the other witnesses made similar acknowledgements of perjury before the pretrial investigator.

In view of this testimony, trial counsel's opening statement, that the accused had so instructed McDaniel and "all three did as requested and perjured themselves at the pretrial," was merely fair comment upon the testimony he expected to produce. Cf. United States v Doctor, 7 USCMA 126, 21 CMR 252.

The defense next contends that the law officer improperly curtailed cross-examination of prosecution witnesses Schmidt and McDaniels. On direct examination, Schmidt testified to the three separate acts of sodomy alleged in three specifications of Charge I. Under cross-examination, he acknowledged he had been granted immunity from prosecution for perjury committed at the pretrial investigation. After admitting his pretrial exculpation of the accused to be a lie, further cross-examination developed the admission that such testimony amounted to perjury. The defense counsel then sought to retrace each of the statements made, but the law officer sustained a prosecution objection, declaring that the matters had been covered adequately.

Undoubtedly cross-examination of prosecution witnesses stands at the forefront of the rights afforded accused individuals under our scheme of justice. This right is best protected by affording the cross-examiner reasonable latitude in the scope and extent of his interrogation. However, some limits are required, and courts generally have left these limits to the determination of the trial judge in the exercise of his sound discretion. Alford v United States, 282 US 687, 75 L ed 624, 51 S Ct. 218; United States v Heims, 3 USCMA 418, 12 CMR 174.

In the instant case, the law officer's ruling with respect to the cross-examination of Schmidt was a proper exercise of his discretion. The witness had admitted that his pretrial statement exculpating the accused was perjury. To permit counsel to recite each and every portion of that statement would serve no useful purpose, for the optimum of impeachment had already been obtained. In this particular, we note that the accused was acquitted of two of the specifications concerning which this witness testified. Schmidt's testimony with reference to them was uncorroborated. His testimony relative to the single specification of which the accused was convicted under Charge I was corroborated, in part, by testimony of the Intelligence agents. Under the circumstances, we conclude the accused was not prejudiced by the curtailment.

The same considerations apply to the testimony of the witness McDaniels, and nothing presented by the record or the arguments of counsel require further elaboration upon that portion of the assignment respecting it.

The next assignment requiring discussion challenges the sufficiency of the specification of Charge II to state an offense under Article 133 of the Uniform Code, supra. That specification alleges that the accused "publicly associate[d] with persons known to be sexual deviates, to the disgrace of the armed forces."

Historically, conduct violative of this Article is defined as "action or behavior in an official capacity which, in dishonoring or disgracing the individual . . . personally, seriously compromises his standing as an officer." Manual for Courts-Martial, United States, 1951, paragraph 212; Winthrop's Military Law and Precedents, 2d ed, 1920 reprint, pages 711, 712. Instances of such conduct cited by each of the foregoing authorities include "public asso-

ciation with notorious prostitutes." The defense seeks to equate this example to the offense sought to be alleged in the specification in question. The gist of that offense, according to the defense argument, is the unfavorable reaction upon the minds of those who might observe the association. United States v Sparhawk, 24 BR 127; United States v Stroud, 48 BR 231, Hence, the failure of this specification to allege the notorious character of the individuals associated with is fatal.

While the provisions of the security regulations might cast strong doubt upon the necessity for showing that notoriety attends every such association[6]—a circumstance which we need not here determine—the present specification sufficiently alleges that element. It avers that the individuals were "known to be sexual deviates" and that the accused's association with them was "to the disgrace of the armed forces." Manifestly, this combination of allegations imports the element of "notorious," for, if the association is completely unknown, or, if the characters of the individuals are unknown, the armed forces would not be disgraced. See United States v Sparhawk, supra. The capacity of such association to dishonor or disgrace the accused as an individual, and seriously compromise his standing as an officer, is patent. Thus, the specification is not deficient.

The law officer's instructions upon this offense were consistent with these views. There is, therefore, no necessity for discussing a defense contention that they were defective.

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[6]United States Navy Regulations, Article 1510; United States Navy Security Manual for Classified Matter; Army Regulations 604-5 and 604-10; Air Force Regulation 205-6.

This brings us to one further assignment of error relating to the specification of Charge II. The accused contends that by permitting Government witnesses to testify that certain individuals were homosexuals, the law officer erred to his prejudice. This refers to testimony of Schmidt, McDaniels, and agent Strolin. As a law enforcement officer, the latter certainly was in a position, as indicated by this testimony, to know the reputation of the individuals with whom the accused associated. Both Schmidt and McDaniels were admitted deviates of long-standing. Each asserted thorough knowledge of the activities of all those with whom the accused associated on the occasion in question. The sum total of these activities was expressed by these witnesses in the conclusion now objected to. Without detailing the specifics of the depravity involved, it is sufficient to here record that their testimony was not an expression of opinion upon the meaning of certain traits or tendencies nor upon a hypothetical situation. They described acts which leave no doubt about the accuracy of their characterizations. Thus, there was no error in receiving this testimony.

A final assignment relative to Charge II challenges the sufficiency of the evidence to support the findings thereon. This is predicated upon the assumption that since the association occurred solely in the presence of sexual deviates, the element of disgrace to the services is necessarily lacking. This argument misconceives the evidence, for the conduct was observed by intelligence agents, and at least one female was present. Assuming the correctness of the defense estimate of the evidence, the fallacy of this argument is completely demonstrated by this Court's opinion in United States v Berry, 6 USCMA 609, 20 CMR 325.

Other assignments relate to alleged improper remarks by trial counsel during the course of trial, the characterization of the accused as "a very immoral man" by one of the witnesses, improper use of the Manual for Courts-Martial, supra, by court members, and destruction of certain photographs. None of these assignments are meritorious.

The accused next asserts that the post-trial review of the staff legal officer is fatally deficient in two particulars. First, he omitted all mention of the evidence produced by the defense, and, second, he expressed no opinion as to the adequacy and weight of the evidence as a whole. The Government concedes that the review is defective and that a new review is required. Our examination of the review indicates that this concession is proper. United States v Fields, 9 USCMA 70, 25 CMR 332; United States v Grice, 8 USCMA 166, 23 CMR 390; United States v Johnson, 8 USCMA 173, 23 CMR 397.

Our disposition of the latter assignment makes unnecessary further consideration of a claim that the convening authority's issuance of letters of immunity to prosecution witnesses disqualified him from reviewing the record of trial.

The decision of the board of review is reversed. The record of trial is returned to The Judge Advocate General of the Navy for reference to another reviewing authority for further proceedings under Articles 61 and 64, Uniform Code of Military Justice, 10 USC §§ 861, 864.

Judges Latimer and Ferguson concur.